Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-2933–11 OF 2011
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND BALIA YUSOF JJCA
8 MARCH 2013

Civil Procedure — Striking out — Statement of claim — Amendment — Whether plaintiff should have been allowed to amend statement of claim due to changed factual matrix — Whether claim that can be saved by amendment not to be struck out summarily

Civil Procedure — Striking out — Statement of claim — Claim that registration of charge obtained by means of insufficient or void instrument — Whether issues raised required mature consideration — Whether summary disposal improper

Land Law — Charge — Validity, of — Whether charge not indefeasible — Whether charge null and void — Whether registration of instrument and memorial obtained by means of insufficient or void instrument — Whether charge may be granted to two or more persons or bodies otherwise than as trustees or representatives — Whether chargee failed to inform chargor in writing about transfer of charge to another party — National Land Code ss 241(4), 242, 340(2), 344(1) & (2)

The appellant was the registered proprietor of that piece of land ('the land'). The appellant had executed an instrument in Form 16A ('the Instrument') pursuant to s 242 of the National Land Code ('NLC') by which the appellant was said to have created a charge in favour of Bank Bumiputra Malaysia Berhad ('BBMB') as trustee. Subsequently, the respondent came onto the title of the land as chargee by way of a transfer of charge from BBMB. BBMB had executed the Instrument as trustee for the purpose of repayment of RM186,000,000. The charge was in favour of BBMB as security agent for a number of guarantors who provided monies to the appellant pursuant to a guarantee facility agreement ('GFA'). In this suit, the appellant sought declarations that the charge was not indefeasible within the meaning of s 340(2) of the NLC; that the charge was null and void; and that the charge, instrument and memorial were invalid and thus be set aside. The appellant contended, inter alia: (a) that the interest purported to have been vested in the respondent by way of the Instrument and memorial was defeasible because the registration of the Instrument and memorial was obtained by means of an

insufficient or void instrument; (b) that on the strength of s 241(4) of the NLC read together with s 344(1) and (2) of the NLC, no charge may be granted to two or more persons or bodies otherwise than as trustees or representatives and since BBMB and later the respondent were both the sole chargee and security agent of the guarantors, neither BBMB nor the respondent was capable of entering upon the Instrument as trustee; (c) that in light of s 344 of the NLC, since no such trust had been formed between the appellant and BBMB or the respondent, neither BBMB nor the respondent could be so registered; (d) that since the respondent did not notify the appellant of the transfer of the charge in writing, it was not liable to the respondent for any amounts claimed. The respondent had in an earlier charge action obtained an order for the sale of the land pursuant to s 256 of the NLC but at the time of filing of the suit, the land was yet to be sold. The respondent applied to strike out the appellant's writ of summons and the statement of claim under O 18 r 19 and/or O 92 r 4 of the Rules of the High Court 1980 ('RHC'). The respondent argued that the suit had become academic because the land had since been sold at a public auction. The learned High Court judge ('judge') had struck out the appellant's suit based on the grounds that the suit was barred by the plea of res judicata; that the suit was time barred by limitation; and that the suit has become academic. Hence this appeal by the appellant.

Held, allowing the appellant's appeal with costs of RM10,000 here and below:

(1) The trial judge did not specify under which of the limbs of O 18 r 19(1) of the RHC that she relied upon in order to strike out the appellant's writ and statement of claim. The judge had relied on the cumulative limbs of O 18 r 19(1). This approach in construing O 18 r 19(1) was erroneous and it called for appellate intervention (see paras 33–34 & 37).

(2) The judge erred in holding that the appellant was estopped from raising the same issue in the current suit as it was caught by the doctrine of res judicata. The order for sale made in the earlier charge action under s 256 of the NLC was not a judgment or a decree and, consequently, neither res judicata nor cause of action estoppel nor issue estoppel could be invoked in favour of the respondent to the detriment of the appellant (see para 46).

(3) The judge erred when she held that there existed an agreement by virtue of a simple letter dated 25 October 1999 that BCBB had retired from their role as the security agent. And because of the said letter, the judge held that the appellant's current suit was time barred as time started to run from 1993. But the impugned charge was only transferred from BBMB to the respondent in 2009 (see para 48).

(4) The appellant filed the current suit on 19 May 2009. At the time of filing the current suit, the land was yet to be sold pursuant to the order for sale. The land was only sold by the court at a public auction on 30 March

2011. With the changed factual matrix, the appellant must be accorded the right to amend its statement of claim. Any claim that could be saved by an amendment should not be struck out summarily. It is trite that where the pleadings are defective and the opposing party seeks to strike out the pleadings, the court must be wary and ought not to act summarily if an amendment can correct the defect (see paras 51–52).

(5) The appellant had mounted the challenge under s 340(2)(b) of the NLC where registration was obtained by means of an insufficient or void instrument. If the appellant succeeded, the transaction would be void and the charge was of no effect. That by itself called for a full trial (see para 71).

(6) No matter how weak the case is and that the appellant is not likely to succeed at the trial, it is not a good ground for the writ of summons and the statement of claim to be struck out. In the event, the appellant's suit was dismissed at the trial, the respondent would be compensated by costs. This was not a proper case for the High Court to invoke its summary process to strike out the appellant's in personam claim challenging the indefeasibility of the impugned charge. The issues raised required mature consideration and ought not to be disposed off summarily (see paras 77–78).

[Bahasa Malaysia summary

Perayu merupakan pemilik berdaftar untuk sebidang tanah ('tanah tersebut'). Perayu telah menandatangani instrumen di dalam Borang 16A ('instrumen tersebut') mengikut s 242 Kanun Tanah Negara ('KTN') yang mana perayu dikatakan telah membuat gadaian bagi pihak Bank Bumiputra Malaysia Berhad ('BBMB') sebagai pemegang amanah. Selanjutnya, responden memegang geran tanah sebagai pemegang gadaian melalui pindah milik cagaran daripada BBMB. BBMB telah menandatangani instrumen sebagai pemegang amanah bagi tujuan pembayaran semula sebanyak RM186,000,000. Gadaian bagi pihak BBMB sebagai agen sekuriti untuk beberapa penjamin yang memberikan wang kepada perayu mengikut perjanjian kemudahan jaminan ('PKJ'). Dalam guaman ini, perayu memohon deklarasi-deklarasi bahawa gadaian tersebut boleh disangkalkan dalam maksud s 340(2) KTN; bahawa gadaian tersebut adalah terbatal dan tidak sah; dan bahawa gadaian, instrumen dan memorial adalah tidak sah dan justeru boleh diketepikan. Perayu berhujah, antara lain: (a) bahawa faedah yang dikatakan telah diberikan kepada responden melalui instrumen dan memorial boleh disangkalkan kerana pendaftaran instrumen dan memorial yang diperoleh melalui instrumen yang tidak mencukupi atau terbatal; (b) bahawa berdasarkan kekuatan s 241(4) KTN dibaca bersama s 344(1) dan (2) KTN, tiada gadaian boleh diberikan kepada dua atau lebih orang atau badan-badan selain daripada sebagai pemegang amanah atau wakil dan memandangkan BBMB dan kemudiannya responden kedua-duanya merupakan pemegang

gadaian dan agen sekuriti bagi penjamin-penjamin, BBMB ataupun responden tidak boleh memeterai instrumen sebagai pemegang amanah; (c) merujuk kepada s 344 KTN, memandangkan tiada amanah telah dibentuk antara perayu dan BBMB atau responden, BBMB atau responden tidak boleh didaftarkan; (d) bahawa memandangkan responden tidak memberitahu perayu mengenai pindak milik gadaian dalam bentuk tulisan, ia tidak bertanggungjawab kepada responden untuk sebarang amaun yang dituntut. Responden telah pada tindakan gadaian terdahulu memperoleh perintah untuk jualan tanah menurut s 256 KTN tetapi semasa memfailkan guaman, tanah tersebut belum lagi dijual. Responden memohon untuk membatalkan writ saman dan penyata tuntutan perayu di bawah A 18 k 19 dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Responden berhujah bahawa guaman menjadi akademik oleh kerana tanah tersebut telah dijual semasa lelongan awam. Hakim Mahkamah Tinggi yang bijaksana ('hakim') telah membatalkan guaman perayu berdasarkan alasan-alasan bahawa guaman telah dihalang oleh rayuan res judicata; bahawa guaman telah dihalang oleh masa melalui had masa; dan bahawa guaman telah menjadi akademik. Justeru rayuan ini oleh perayu.

Diputuskan, membenarkan rayuan perayu dengan kos sebanyak RM10,000 di sini dan Mahkamah Tinggi:

(1) Hakim tidak menetapkan cabang yang mana satu di bawah A 18 k 19(1) KMT yang disandarkan oleh beliau untuk membatalkan writ dan penyata tuntutan perayu. Hakim telah bergantung kepada cabang kumulatif A 18 k 19(1). Pendekatan ini dalam menterjemah A 18 k 19(1) adalah suatu kesilapan dan mewajarkan campur tangan rayuan (lihat perenggan 33–34 & 37).

(2) Hakim telah terkhilaf dalam memutuskan bahawa perayu telah diestop daripada menimbulkan isu yang sama dalam guaman ini memandangkan ia tertakluk kepada doktrin res judicata. Perintah jualan yang dibuat pada tindakan gadaian terdahulu di bawah s 256 KTN bukanlah suatu penghakiman atau dekri dan, selanjutnya, res judicata atau tindakan kausa estopel atau isu estopel tidak boleh digunakan bagi pihak responden tanpa menjejaskan perayu (lihat perenggan 46).

(3) Hakim telah terkhilaf apabila beliau memutuskan bahawa wujud perjanjian menurut surat yang ringkas bertarikh 25 Oktober 1999 bahawa BCBB telah bersara daripada tugas mereka sebagai ejen sekuriti. Dan disebabkan surat ini, hakim memutuskan bahawa guaman perayu ini adalah dihalang oleh masa memandangkan masa ia bermula adalah dari tahun 1993. Tetapi gadaian yang dipertikaikan telah dipindah milik daripada BBMB kepada responden hanya pada tahun 2009 (lihat perenggan 48).

(4) Perayu telah memfailkan guaman ini pada 19 Mei 2009. Pada masa

pemfailan guaman ini, tanah tersebut belum lagi dijual menurut perintah jualan. Tanah tersebut telah dijual oleh mahkamah semasa lelongan awam pada 30 Mac 2011. Dengan asas fakta yang telah berubah, perayu hendaklah diberikan hak untuk meminda penyata tuntutannya. Sebarang tuntutan boleh diselamatkan melalui pemindaan tidak seharusnya dibatalkan secara ringkas. Adalah tetap bahawa di mana pliding-pliding adalah cacat dan pihak lawan memohon untuk membatalkan pliding, mahkamah hendaklah berhati-hati dan tidak seharusnya bertindak secara ringkas sekiranya pindaan boleh membetulkan kecacatan tersebut (lihat perenggan 51–52).

(5) Perayu telah memulakan cabaran di bawah s 340(2)(b) KTN di mana pendaftaran yang diperoleh melalui instrumen yang tidak mencukupi atau tidak sah. Sekiranya perayu berjaya, transaksi tersebut akan menjadi terbatal dan gadaian tidak mempunyai apa-apa efek. Ini secara tersendirinya mewajarkan perbicaraan penuh (lihat perenggan 71).

(6) Tidak kira bagaimana lemah kes ini dan bahawa perayu berkemungkinana tidak akan berjaya di dalam perbicaraan, ia bukanlah dasar yang baik untuk membatalkan writ saman dan penyata tuntutan. Dalam kejadian ini, guaman perayu ditolak semasa perbicaraan, responden akan dipampas dengan kos. Ini bukan kes yang wajar bagi Mahkamah Tinggi untuk menggunakan proses ringkasnya untuk membatalkan tuntutan in personam perayu yang mana mencabar ketidakbolehsangkalan gadaian yang dipertikaikan. Isu-isu yang timbul memerlukan pertimbangan yang matang dan tidak seharusnya dibatalkan secara ringkas (lihat perenggan 77–78).]

Notes

For cases on statement of claim, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8089–8139.

For cases on validity of charge, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2954–2966.

Cases referred to

Affin Bank Bhd v Eye Bee Sdn Bhd [2005] 7 MLJ 1, HC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Bank of China v Ngan Ching Wen [2005] 7 MLJ 28, HC (refd)

Bass v Permanent Trustee Company Limited (1999) 73 ALJR 522, HC (refd)

Datuk Ir Che Amran bin Mohd Yusoff v Yayasan Melaka & Others [2003] MLJU 7, HC (refd)

Eu Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37, FC (refd)

Good v Parry [1963] 2 All ER 59, CA (refd)

Harkness v Bell's Asbestos And Engineering Ltd [1967] 2 QB 729, CA (refd)
Harris Mohd Salleh v Ismail bin Majin, Returning Officer & Ors and another application [2000] 3 MLJ 434, HC (refd)
Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal [1998] 2 MLJ 498, CA (refd)
In re Transplanters (Holding Company) Ltd [1958] 1 WLR 822, Ch D (refd)
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119, SC (refd)
Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd [1995] 1 MLJ 504, HC (refd)
Lim Weow @ Lim Neu v Perwira Habib Bank Malaysia Berhad [2001] 2 AMR 1307, HC (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77; [1997] 2 CLJ 36, FC (refd)
Maganja v Arthur Trading As Shirley Arthur's Beauty Centre [1984] 3 NSWLR 561 (refd)
Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor [1967] 1 MLJ 87 (refd)
Oh Thevesa v Sia Hok Chai [1992] 1 MLJ 215, HC (refd)
Omega Holdings Bhd v Dato' Tiah Thee Kian & Ors [2002] 6 MLJ 20, HC (refd)
Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd [1998] 4 MLJ 129; [1998] 3 CLJ 677, CA (refd)
Perwira Habib Bank (M) Bhd v Hj Abdullah Hj Sulaiman & Anor [1985] CLJ (Rep) 639, HC (refd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558, HC (refd)
R v Rogers (No 2) (1992) 29 NSWLR 179 (refd)
Roslan bin Abdullah v New Zealand Insurance Co Ltd [1981] 2 MLJ 324, FC (refd)
S Manickam & Ors v Ismail bin Mohamad & Ors [1997] 2 MLJ 90, HC (refd)
Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor [1996] MLJU 510; [1997] 1 CLJ 775, HC (refd)
Saripah bte Manap & Ors v Emar Sdn Bhd (in dissolution) & Ors [1998] 1 MLJ 323, HC (refd)
Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413 (refd)
Somodaj v Australian Iron And Steel Limited (1963) 109 CLR 285, HC (refd)
United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352b, HC (refd)
Wee Tiang Teng v Ong Chong Hooi & Anor [1978] 2 MLJ 54, FC (refd)

Legislation referred to

Companies Act 1965
Limitation Act 1953 s 26
National Land Code ss 241, 241(1), (3), (4), 242, 243, 256, 259(3)(a), 340, 340(2), (2)(b), 344, 344(1), 433B, Forms 16A, 16F, Chapter 16 Parts 3, 4

Rules of the High Court 1980 O 18 r 19, O 18 r 19(1), (1)(a), (b), (c), (d), O 27, O 92 r 4

Bastian Vendargon (BE Teh with him) (Teh & Associates) for the appellant.
Tommy Thomas (Rahayu Mumazaini with him) (Tommy Thomas) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] Via the writ of summons and the statement of claim, the appellant filed a suit against the respondent and sought for the following reliefs:

(a) a declaration that the charge is not indefeasible within the meaning of section 340(2) of the National Land Code 1965;

(b) a declaration that the charge is null and void;

(c) a declaration that the charge, the instrument and the memorial are invalid;

(d) an order that the charge, the instrument and the memorial be set aside;

(e) an order that the order for sale dated 16.7.2007, the auction and other related orders in respect of the land made in the Kuala Lumpur High Court OS Proceedings (Suit No: S-24-2394-2005) be set aside;

(f) an order that the Registrar of Titles cancel the entries from the register in respect of the charge, the instrument and the memorial;

(g) costs; and

(h) such further or other orders as this Honourable Court deems just and fit.

[2] By way of a summons in chambers, the respondent sought to strike out the appellant's writ of summons and the statement of claim under O 18 r 19(1)(a) and/or (b) and/or (c) and/or (d) of the Rules of the High Court 1980 ('RHC') and/or under the inherent jurisdiction of the court, namely, under O 92 r 4 of the RHC.

[3] The High Court allowed the respondent's application and forthwith struck out the appellant's writ of summons and the statement of claim. Aggrieved, the appellant now appeals to this court.

THE FACTS

[4] The appellant was the registered proprietor of that piece of land held under Geran 10012, Lot 38, Seksyen 51, Bandar Kuala Lumpur ('the land').

[5] The respondent is a financial institution incorporated in Malaysia.

[6] On 16 August 1993, the appellant executed an instrument in Form 16A pursuant to s 242 of the National Land Code ('NLC') — 'the instrument', and by this instrument, the appellant was said to have created a charge in favour of Bank Bumiputra Malaysia Bhd ('BBMB') as trustee.

[7] On or about 3 April 2002, the respondent came onto the title of the land as chargee by way of a transfer of charge from the original chargee, namely, BBMB.

[8] BBMB executed the instrument as trustee. According to para (i) of the instrument, the charge was for the purpose of the repayment of RM186,000,000 to the chargee. The instrument also stated that the said sum had been received by the appellant.

[9] The instrument further provides that the repayment was to be in accordance with the terms stipulated in the annexure to the charge ('the annexure').

[10] The appellant and BBMB were the signatories to the annexure. Inter alia, the annexure, in material particulars, stated as follows:

(a) that the charge, as specified in the recital was in favour of BBMB as security agent for a number of guarantors who provided monies to Metroplex Bhd pursuant to a guarantee facility agreement dated 16 August 1993 ('GFA');

(b) that, by virtue of cl 2, the undertaking to pay by the appellant was a covenant with the security agent for the benefit of the security agent and the guarantors;

(c) that, by virtue of cl 33, the security agent may, with or without notice to the appellant, transfer the charge; and

(d) that, by virtue of cl 37, the appellant covenanted that the GFA shall be read as forming part of the annexure.

[11] The stand of the appellant was rather simple. That the interest purported to have been vested in the respondent by way of the instrument and memorial ('the memorial') is defeasible and ought to be set aside because the registration of the instrument and the memorial was obtained by means of an insufficient or void instrument.

[12] The appellant further averred that:

(a) on the strength of s 241(4) of the NLC read together with s 344(1)–(2) of the NLC, no charge may be granted to two or more persons or bodies otherwise than as trustees or representatives and once transferred, the registrar shall so describe it in the memorial of registration;

(b) since BBMB and later the respondent were both the sole chargee and security agent of the guarantors neither BBMB nor the respondent is capable of entering upon the Instrument as trustee;

(c) s 344 of the NLC envisages the situation where a trustee can be so registered as such where a trust has been formed between the chargee and chargor. And since no such trust has been formed between the appellant and BBMB or the respondent, neither BBMB nor the respondent can be so registered;

(d) the instrument provides that the charge was to secure repayment to the chargee qua lender when in fact it was to secure payment to the chargee qua trustee; and

(e) at any rate, the respondent was neither, in fact or in law, a lender or trustee to the appellant and no repayment was due to it.

[13] The appellant averred that since the respondent did not notify the appellant of the transfer of the charge in writing, it is not liable to the respondent for any amounts claimed or at all.

[14] It is the contention of the appellant that the respondent was appointed as the security agent in contravention of cl 18(G) of the GFA and, consequently, BBMB had no power to transfer the charge to the respondent.

[15] It is also the contention of the appellant that BBMB appointed the respondent as security agent within 30 days of its notice period as stipulated under cl 18(G) of the GFA, during which time, only the guarantee facility agent was empowered to appoint a security agent. That being the case, the appointment of the respondent was of no effect.

[16] It is the contention of the appellant that:

(a) BBMB had no power to appoint the respondent as the security agent;

(b) the transfer of the charge is invalid; and

(c) the memorial is an insufficient or void instrument to register the transfer of the charge.

[17] That the charge is void pursuant to s 433B of the NLC because six of the guarantors under the GFA, namely:

(a) Banque Internationale A Luxembourg;

(b) Bank of Nova Scotia;

(c) Credit Lyonnais;

(d) Chiao Tung Bank Co Ltd;

(e) Standard Chartered Bank; and

(f) Overseas Chinese Commercial Banking Corporation had failed to secure the state authority's approval for the creation of their purported interest in the land by way of the charge.

[18] The respondent obtained, on 16 July 2007, an order for the sale of the land pursuant to s 256 of the NLC in the Kuala Lumpur High Court OS Proceedings (Suit No S-24–2394 of 2005) ('order for sale').

[19] Now, at the time of filing the current suit, the land has yet to be sold pursuant to the order for sale.

ANALYSIS

[20] It must be borne in mind that the appellant's current suit is predicated upon a cause of action that the charge created by the appellant over the land in favour of the respondent is not indefeasible within the meaning of s 340(2) of the NLC.

[21] There was never a trust formed between the appellant and BBMB with regard to the charge.

[22] The respondent came onto the register, as chargee of the land via a transfer from BBMB. According to the appellant, the transfer of the charge from BBMB to the respondent was obtained by means of an insufficient or void instrument. And it is this issue that should proceed for trial.

[23] Striking out is only adopted when it is conspicuously clear that the claim is obviously unsustainable. The court must be guided by the root word 'obviously' because that word is the guiding light which shows that the claim must be plainly or evidently unsustainable in law before the claim is struck out (*Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558 (HC)). Such power should only be exercised by the court sparingly (*Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1; *Roslan bin Abdullah v New Zealand Insurance Co Ltd* [1981] 2 MLJ 324 (FC); *Datuk Ir Che Amran bin Mohd Yusoff*

v Yayasan Melaka & Others [2003] MLJU 7; *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413 (HC); *Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor* [1967] 1 MLJ 87 (HC); *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal* [1998] 2 MLJ 498 (CA); *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (SC); and *S Manickam & Ors v Ismail bin Mohamad & Ors* [1997] 2 MLJ 90).

[24] If the pleadings disclose some cause of action or has raised some question fit to be decided, then it is appropriate that the case should be set down for trial, no matter how slight the chances are of succeeding (*Saripah bte Manap & Ors v Emar Sdn Bhd (in dissolution) & Ors* [1998] 1 MLJ 323 (HC)). And when there are issues to be determined by way of discovery or by way of cross-examination, then the summary process of striking out is not appropriate (*Omega Holdings Bhd v Dato' Tiah Thee Kian & Ors* [2002] 6 MLJ 20).

[25] The appellant here is saying that they should be given their day in court by way of a full trial for them to ventilate their case to the fullest.

[26] It was argued on behalf of the respondent that the appeal has turned academic because the land where Putra Place stood was sold by the court at a public auction on 30 March 2011 to OSK Trustees Bhd (as trustees for Sunway REIT) ('OSK') for the sum of RM513,945,000. OSK, according to learned counsel for the respondent, is now the registered proprietor of the land.

[27] It was further emphasised by learned counsel for the respondent that this appeal is academic for the following reasons:

(a) the charge over Putra Place was discharged when the certificate of sale in Form 16F pursuant to s 259(3)(a) of the NLC was subsequently presented at the land office for registration and OSK was registered as the proprietor of Putra Place at 9.31am on 19 April 2011; and

(b) OSK's title over Putra Place is now indefeasible pursuant to s 340 of the NLC.

[28] It was also submitted by learned counsel for the respondent that to date, the appellant has not challenged the indefeasibility of OSK's title over Putra Place. On this ground alone, learned counsel for the respondent submitted that the appellant's appeal should be dismissed.

[29] But the appellant questioned the indefeasibility of the respondent's interest as chargee of the land on the following grounds:

(a) that since BBMB and the respondent were both sole chargee and security

agent of the guarantors, neither BBMB nor the respondent is capable of being registered as trustee of a charge as envisaged in s 241(4) of the NLC read together with s 344(1)–(2) of the NLC;

(b) that a trustee can be registered when a trust has been formed between the chargee and the chargor under s 344 of the NLC; but in this case, there was no trust formed between the appellant and BBMB or the respondent; and

(c) that the charge was to secure repayment to the chargee qua lender, when in fact it was to secure payment to the chargee qua trustee; whereas in reality, the respondent was neither a lender or trustee to the appellant.

[30] It bears repetition to say that there are two other strong grounds to impugn the charge, namely:

(a) BBMB had no power to appoint the respondent as the security agent because such a power was vested in the guarantee facility agent as stipulated in cl 18(G) of the GFA; and

(b) the charge violates s 433B of the NLC in that six of the guarantors under the GFA are foreign companies which failed to obtain the requisite approval of the state authority.

[31] We must not forget that this appeal concerned the striking out of the appellant's writ of summons and the statement of claim. Order 18 r 19 of the RHC states as follows:

> 19 Striking out pleadings and indorsements (O 18 r 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).
>
> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

[32] Mohamed Dzaiddin SCJ (later the Chief Justice of Malaysia) in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd*, at p 43, aptly laid down the law in regard to striking out. This was what His Lordship said:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L&NW Rly Co* [1892] Ch 274). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors* [1965] 1 WLR 1238; [1965] 2 All ER 871). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86). The court mut be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[33] We have perused through the written grounds of judgment of the learned High Court judge and we found that Her Ladyship did not specify under which of the limbs of O 18 r 19(1) of the RHC that she is relying upon in order to strike out the appellant's writ of summons and the statement of claim.

[34] Her Ladyship decided that the appellant's writ of summons and the statement of claim may be struck out based on the respondent's application which relied on the cumulative limbs of O 18 r 19(1) of the RHC.

[35] Abdul Malik bin Ishak J (now JCA) in *Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor* [1996] MLJU 510; [1997] 1 CLJ 775 at p 778, had this to say about the disjunctive approach to O 18 r 19(1) of the RHC:

> The word 'or' appears between (a), (b), (c) and (d) of O 18 r 19(1) of the RHC and in ordinary usage the word 'or' is said to be disjunctive (*Uddin v Associated Portland Cement Manufacturers Ltd* [1965] 2 QB 582; *R v Surrey Quarter Sessions, ex parte Commissioner of Metropolitan Police* [1963] 1 QB 990). In my judgment, the second defendant when resorting to O 18 r 19(1) of the RHC must be very specific and must not cumulatively add (a), (b), (c), (d) together and lump them as one as it would run counter to the explicit provisions of r 19(2) of O 18 of the RHC.

[36] NH Chan JCA in *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd*

[1998] 4 MLJ 129; [1998] 3 CLJ 677, writing for the Court of Appeal, echoed the same sentiments, and this was what he said at p 131 (MLJ); pp 679–680 (CLJ):

> The appellant in its summons relied on all the grounds under r 19(1), namely, grounds (a), (b), (c) and (d) as well as an additional ground (e) under the inherent jurisdiction of the court. The summons also declared that it was supported by the affidavit of Chang Fok Chin. Between ground (a) and ground (b) in the summons, the appellant had interpolated the words 'and/or'. The respondent took exception to this because of the use of the conjunction 'and' between ground (a) and ground (b) in the summons as that would mean that the supporting affidavit was being used even for ground (a) where no affidavit evidence was admissible (O 18 r 19(2)). Both the senior assistant registrar and the judge below upheld the objection and the appellant's summons was struck off with liberty given to the appellant to file afresh. In effect all that the appellant had to do at the time was to file his summons again and by then he should be wary of using the offending cumulative word 'and' between ground (a) and ground (b) in his summons under O 18 r 19(1).

[37] With the greatest of respect, the approach adopted by Her Ladyship in construing O 18 r 19(1) of the RHC was erroneous and it called for appellate intervention.

[38] The learned High Court judge had struck out the appellant's current suit based on the following grounds:

(a) that the current suit is barred by the plea of res judicata;

(b) that the current suit is time barred by limitation; and

(c) that the current suit has become academic.

THE PLEA OF RES JUDICATA

[39] The learned High Court judge erred when she held that the 'cause to the contrary' ought to have been raised in the Kuala Lumpur High Court OS Proceedings (Suit No S-24–2394 of 2005) which concerned a charge action which ultimately gave rise to an order for sale. With respect, Her Ladyship failed to appreciate that 'cause to the contrary' could be raised as a ground in a fresh action to set aside a charge just like what the appellant is doing in this appeal before us. In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC), Mohd Azmi FCJ writing a separate judgment for the Federal Court had this to say about the special exception to the doctrine governing the finality of court orders (see the headnote at p 394):

(1) (Per Mohd Azmi FCJ) In setting aside the third order, the Court of Appeal missed completely to appreciate the central argument on the availability of the inherent jurisdiction of the High Court to exercise its discretion to set aside what was obviously an illegal attempt by the respondent to subvert and effectively reverse the original March 1988 final and perfectly legitimate order as a special exception to the doctrine governing the finality of court orders notwithstanding the absence of any appeal.

It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. Apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[40] Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b, allowed an application by the chargor to set aside an order for sale of a piece of land and this was what His Lordship said (see the headnote at p 353 of the report):

(1) The submission of the chargee's counsel relying on s 418 of the Code fails. Where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be attacked in collateral proceedings before any court or tribunal, and in collateral proceedings the court may declare an act that purports to bind to be non-existent. The party affected by the decision may appeal but he is not bound to do so because he is at liberty to treat the act as void.

[41] Diplock LJ wrote a separate judgment in *Harkness v Bell's Asbestos And Engineering Ltd* [1967] 2 QB 729 (CA) and, at p 736, this was what His Lordship said about the option to adopt when faced with an order that was a nullity:

Taking the view that the order was a nullity, he thought that he could do nothing about it. The view, though logical, is contrary to authority and it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside.

[42] That brilliant judge in the person of Abdoolcader J in *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37, writing for the Federal Court, had this to say about mounting a collateral proceeding to challenge an existing order considered to be a nullity at p 39 of the report:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.

[43] It is opportune to now refer to the Supreme Court case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 2 CLJ 36 which concerned an order for the sale of a charged land. Gopal Sri Ram JCA writing for the Supreme Court had this to say (see the headnote at p 37 of the report):

> (5) Proceedings under section 256 are not concerned with any contractual claims that the chargor may have against the chargee. They are concerned with the very narrow and limited question whether the chargor has adduced facts that establish cause to the contrary in the sense discussed herein. It follows that if the chargor is unable to sustain his opposition to the making of the order for sale vide a proceeding in rem, he may nevertheless sue the chargee in personam for breach upon the personal covenant or in equity. And it follows further that, notwithstanding that the order for sale herein had been properly granted, the appellant may still bring an action in personam for breach of contract against the respondent upon the first and second grounds of his complaints. It is not open to the respondent, in such an action, to plead issue estoppel or res judicata. This is because the Judge who makes the order does determine an issue or a cause for an estoppel to operate, and secondly, an order for sale made under section 256 National Land Code is not a judgment.

[44] It is pertinent to note that the judgment in *Low Lee Lian* referred to the decision of the Supreme Court in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, a decision of Eusoff Chin SCJ, where His Lordship held that (see the headnote at p 119 of the report):

> Held, allowing the appeal:
>
> (1) A chargee who makes an application for an order for sale in foreclosure proceedings does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. In order for the doctrines of res judicata, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree. This requirement is not met by foreclosure proceedings which do not result or terminate in a final judgment or decree.
>
> (2) Where a chargor raises issues and relies upon facts to show 'cause to the

contrary' in proceedings brought against him by the chargee, he is not barred from bringing a fresh action against the chargee (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither res judicata nor cause of action estoppel nor issue estoppel are available to the chargee to meet the chargor's action.

(3) The trial judge was in error when he held that the appellant was estopped by res judicata from raising in the subsequent action the identical issues which he had raised in the foreclosure proceedings. The appeal was therefore allowed and a retrial of the action was ordered.

[45] We pause here for a moment. It is clear that the present appeal concerned reliefs pertaining to declarations which questioned the validity of the charge, the instrument and the memorial as invalid and ought to be set aside. It concerned an order that was a nullity. And an order which is a nullity can be challenged in a collateral proceeding. And the appellant is entitled to come to this court and ask that that order be set aside.

[46] With respect, the learned High Court judge also erred in law and in fact when Her Ladyship held that the appellant was estopped from raising the same issue in the current suit as it is caught by the doctrine of res judicata. It is trite that the order for sale made under s 256 of the NLC is not a judgment or a decree and, consequently, neither res judicata nor cause of action estoppel nor issue estoppel can be invoked in favour of the respondent to the detriment of the appellant. See *Kandiah Peter v Public Bank Bhd*.

[47] The latin phrase 'res judicata pro veritatem accipitur' expresses the meaning of 'the need for decisions of the Court, unless set aside or quashed, to be accepted as incontrovertibly correct' (Honourable Justice KR Handley, *'Res Judicata: General Principles and Recent Developments'* [1999] 18(3) Aust Bar Rev 214). But, it must not be forgotten that res judicata only arises from a judgment obtained on the merits. And that no estoppel would arise from a final order which is not a judgment (*Maganja v Arthur Trading As Shirley Arthur's Beauty Centre* [1984] 3 NSWLR 561 at p 564). An interlocutory order (*Somodaj v Australian Iron And Steel Limited* (1963) 109 CLR 285) and an order which requires further action before it is enforceable (*R v Rogers (No 2)* (1992) 29 NSWLR 179 at p 182) are not final orders. Likewise here, the order for sale made pursuant to s 256 of the NLC is open to challenge by the appellant by way of a collateral proceeding as reflected in the current suit. We wish to add that interlocutory orders on matters of practice and procedure do not give rise to res judicata estoppels. And subject to the restraints of the abuse of process doctrine, a second application may be brought by the aggrieved party to set aside a default judgment, or to obtain an extension of the limitation period. See

Bass v Permanent Trustee Company Limited (1999) 73 ALJR 522 at p 535.

THE ISSUE OF LIMITATION

[48] The learned High Court judge erred in law and in fact when she held that there exists an agreement by virtue of a simple letter dated 25 October 1999 that Bumiputra Commerce Bank Bhd ('BCBB') had retired from their role as the security agent (see pp 385–386 of the appeal record at *Jil* 3(2) and as reflected at para 12 of the memorandum of appeal at p 25 of the appeal record at *Jil* 1). And because of the said letter, the learned High Court judge held that the appellant's current suit was time barred as time started to run from 1993. But the impugned charge was only transferred from BBMB to the respondent in 2009.

[49] The appellant filed the current suit on 19 May 2009. At the time of filing the current suit, the land has yet to be sold pursuant to the order for sale. The land was only sold by the court at a public auction on 30 March 2011 to OSK. The issue of limitation must be tied up with the argument that the instrument and memorial was defeasible since the registration of the instrument and memorial was secured by means of an insufficient or void instrument which went to the root of the registration and it ought to be set aside. It was a nullity and the appellant had the option based on the *Harkness principle* either to ignore it or to seek redress in a court of law to have the order set aside. A nullity remains a nullity throughout and limitation would be put at bay. And whether s 26 of the Limitation Act 1953 can come to the aid of the respondent is a triable issue which must necessarily mean that it is not a plain and obvious case which warrants a striking out of the appellant's current suit.

THE CURRENT SUIT HAS BECOME ACADEMIC

[50] It was emphasised that the land was sold by the court at a public auction that was held on 30 March 2011 to OSK for the sum of RM513,945,000. And for this reason, the appeal has become academic.

[51] But the sale to OSK was on 30 March 2011 whereas the appellant's action was filed on 19 May 2009. With the changed factual matrix, the appellant must be accorded the right to amend its statement of claim. Any claim that could be saved by an amendment should not be struck out summarily.

[52] It must be borne in mind that pleadings must be hopeless, baseless or without foundation in law or in equity or an abuse of the process of the court before they can be struck out under O 18 r 19 of the RHC. According to the case of *Harris Mohd Salleh v Ismail bin Majin, Returning Officer & Ors and*

another application [2000] 3 MLJ 434, an application for striking out based on the ground of insufficient particulars cannot be a good reason for striking out. It is trite that where the pleadings are defective and the opposing party seeks to strike out the pleadings, the court must be wary and ought not to act summarily if an amendment can correct the defect (*Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd* [1995] 1 MLJ 504; *Lim Weow @ Lim Neu v Perwira Habib Bank Malaysia Berhad* [2001] 2 AMR 1307; and *Bank of China v Ngan Ching Wen* [2005] 7 MLJ 28).

[53] In our judgment, this is not a plain and obvious case for striking out.

OTHER ANCILLARY ISSUES

[54] Related issues surfaced in the course of hearing this appeal and they may be captioned as follows:

(a) the issue of duplicity; and

(b) the issue of admission.

[55] In regard to duplicity, the learned High Court judge held that the current suit is a duplicity to that of the Kuala Lumpur High Court Suit No S-22NCVC-177 of 2011 ('Suit 177') filed by Metroplex Bhd. It must be noted that the appellant in the current suit is Metroplex Holdings Sdn Bhd.

[56] However, the learned High Court judge acknowledged the fact that the parties in the current suit with that of Suit 177 are different. The plaintiff in Suit 177 is Metroplex Bhd who is the borrower and not the chargor of the land.

[57] It cannot be denied that some of the documents and the facts in the current suit with that of Suit 177 are relatively the same. The appellant herein is the chargor while Metroplex Bhd filed Suit 177 in its capacity as the borrower.

[58] It is pertinent to mention that the learned High Court judge who also heard Suit 177 proceeded to strike it out on the ground, inter alia, that Metroplex Bhd as the borrower lacked locus standi to institute the current suit against the respondent. With respect, the learned High Court judge erred both in law and in fact by making a conflicting ruling that the current suit filed by the appellant as a chargor is a duplicity to that of Suit 177. Her Ladyship also failed to appreciate that there were two civil suits concerning two separate parties. And that every plaintiff has the legal right to institute a civil suit based on similar facts and to avoid duplicity the two suits should be consolidated together.

[59] In regard to the issue of admission, we have this to say. The learned High Court judge erred in law and in fact when she held that the appellant had acknowledged the debt when in fact there were no such admissions. In the current suit, the appellant is merely challenging the validity of the charge.

[60] The document dated 31 March 2003 entitled, 'Proposed Debt Restructuring of the Metroplex Berhad Group' as seen at pp 482–510 of the appeal record at *Jil* 3(2), and the document dated 12 October 2004 entitled, 'Composite Explanatory Statement To Scheme Creditors' and embossed with the words, 'Draft For Discussion Only' as seen at pp 512–659 of the appeal record at *Jil* 3(3), as well as the document dated 28 December 2008 entitled, 'Scheme Paper In Relation To The Restructuring Exercise of Metroplex Berhad' as seen at pp 661–697 of the appeal record at *Jil* 3(3) and marked 'Strictly Private & Confidential' were documents pertaining to the exercises undertaken to structure the company as a whole and had nothing to do with the validity of the charge. These exercises which were related to the appellant were made pursuant to the provisions of the Companies Act 1965 and cannot be construed ipso facto as an admission. Yet, the learned High Court judge held that these documents showed that the appellant had acknowledged the debt to the respondent. Her Ladyship failed to consider nor appreciate the fact that the 'Proposed Debt Restructuring Of The Metroplex Berhad Group' dated 31 March 2003 was a mere proposal and not an admission of the debt. In fact, the presentation paper was not prepared or issued or distributed by Metroplex Bhd Group but it was prepared by the respondent themselves who have not independently verified the information and details therein. At p 510 of the appeal record at *Jil* 3(2), the following passages appeared:

> Commerce International Merchant Bankers Berhad ('CIMB') would like to emphasise that we have not independently verified the information and details provided. Hence, no representation or warranty as to the accuracy of the source material is intended or any opinion as to the possibility of the achievement of the future profits and cashflow should be implied on the part of CIMB by any party who may gain access to the document through any means, lawful or otherwise.
>
> This Presentation Paper is prepared solely for the consumption of the Scheme Lenders, the Board of Directors of Metroplex Berhad ('MB') and persons approved by the Board of Directors of MB. Neither the whole nor any part of the Presentation Paper or any reference therein may be included in any document, circular or statement nor published in any way without the prior written consent from CIMB of the form and context in which it may appear.

[61] Her Ladyship also failed to consider nor appreciate the fact that the 'Composite Explanatory Statement To Scheme Creditors' which was dated 12 October 2004 was prepared by the scheme arrangers and was drafted strictly

for discussion purposes with an added qualification that the document shall not be construed as an admission, in any way, of liability or recognition of the rights of any party.

[62] Again, Her Ladyship also failed to consider or appreciate the fact that the 'Scheme Paper In Relation To The Restructuring Exercise of Metroplex Berhad' dated 28 December 2008 was prepared by the scheme arrangers with the qualification that the document shall not be construed as an admission, in any way, of liability or recognition of the rights of any party. At p 661 of the appeal record at *Jil* 3(3), the following passages reflected the cautious stand of the scheme arrangers:

> This scheme paper is based on information and financial data provided by Metroplex Berhad, who has taken due care to ensure that the facts presented herein are true, fair and reasonable, accurate and valid and that no material information/facts have been intentionally omitted or misrepresented. All information contained herein is strictly confidential and may not be reproduced or used in whole or in part for any other purpose nor furnished to any person other than those authorised by FHMH Corporate Advisory Sdn Bhd. For avoidance of doubt, nothing as set out in this Scheme Paper shall be construed as admission of any debt or its validity or any rights, if any, of the Metroplex Group against its lenders. While the Proposed Restructuring Scheme with the Scheme Creditors has been conservatively evaluated for feasibility on a preliminary basis, detailed discussion with the relevant parties, particularly Scheme Creditors, have not commenced as at the date of preparation of this document. Changes to the Proposed Scheme may be required at a later date to accomodate the interest of all affected parties after further discussion and negotiations with the Scheme Creditors.

[63] Evidence wise, there is no direct or unequivocal admission between Metroplex Bhd and the respondent which would constitute an admission or an acknowledgment of a debt as envisaged under s 26 of the Limitation Act 1953. Suffian LP in *Wee Tiang Teng v Ong Chong Hooi & Anor* [1978] 2 MLJ 54 at p 56, writing for the Federal Court and after referring to the case of *Good v Parry* [1963] 2 All ER 59 in the context of what constitutes an admission of a debt, aptly said:

> There are three kinds of acknowledgment:
>
> (1) an acknowledgment by the debtor that a debt subsisted in the past but not at the time of the acknowledgment;
>
> (2) an acknowledgment that it subsists at the time of the acknowledgment; and
>
> (3) an acknowledgment that it may subsist in the future but not at the time of the acknowledgment.
>
> In *Consolidated Agencies Ltd v Bertram Ltd* [1965] AC 470 the Privy Council at p 482 approved the following statement of an author on the law of limitation:

> To take a demand out of the statute of limitation on the ground of an acknowledgment, the language of the debtor must amount to an unequivocal admission of a subsisting debt, that is subsisting at the time of the acknowledgment.
>
> Though that was a decision on the Indian Limitation Act, 1908, we would respectfully follow the principle therein stated, since the acknowledgments of kinds (1) and (3) are not really admissions that the debtor is indebted to the creditor.

[64] *Perwira Habib Bank (M) Bhd v Hj Abdullah Hj Sulaiman & Anor* [1985] CLJ (Rep) 639 is an interesting case. The brief facts may be stated as follows. The defendants were sued as guarantors of a customer of the plaintiff bank. Judgment in default was entered against the second-named defendant. The first defendant entered an appearance and filed a statement of defence. Thereafter, the first defendant's solicitors wrote a letter to the plaintiffs' solicitors which was not marked 'without prejudice', proposing that the first defendant be allowed to pay the judgment sum by instalments of RM 10,000. The plaintiffs then sought to obtain summary judgment on the basis that pursuant to O 27 of the RHC, the letter amounted to an admission of the plaintiffs' claim. The senior assistant registrar dismissed the plaintiffs' action. The plaintiffs appealed against that decision. The appeal was dismissed with costs. VC George J (as he then was) at p 641 of the report aptly said:

> In my judgment it cannot be said that by that letter the first defendant has unequivocally admitted to liability for the claim made. 'I will pay' does not necessarily imply 'as I am legally obliged to do'.

[65] To compound the matter further, the scheme arrangers are not agents to the company and the scheme papers prepared by the scheme arrangers and vigorously relied upon by the respondent cannot, in our judgment, bind the appellant or Metroplex Bhd and the scheme papers cannot be construed as an acknowledgment saving limitation. By way of an analogy, reference should be made to *Venkoba Rao's Law of Agency*, (3rd Ed), revised by Professor SC Srivastava, Butterworth, New Delhi, at p 826 where it was stated that:

> Auditors are not agents of the company whose accounts they audit for the purpose of making an acknowledgment saving limitation.

[66] In the same vein, Wynn-Parry J in *In re Transplanters (Holding Company) Ltd* [1958] 1 WLR 822 at p 826 aptly said:

> In my view, an auditor of a company is (apart from any special contract, and there is none in this case) not an agent of the company, at any rate for the purpose of being able to bind the company by merely signing the normal certificate at the foot of the balance-sheet. To hold otherwise would, I think, be contrary to the Companies Act, 1948.

[67] Continuing at the same page, Wynn-Parry J had this to say: A

> But I cannot spell out of their certificate anything which would amount to an acknowledgment within ss 23–24 of the Limitation Act 1939, because I cannot spell out of their relations with the company, as to be extracted from the Companies Act 1948, any authority to do anything in the nature of giving an acknowledgment within the Limitation Act 1939, or any authority to do more than to perform the duties laid upon them as auditors by the Companies Act 1948. B

[68] In our judgment, whether the draft scheme papers prepared by the scheme arrangers will tantamount to an unequivocal admission of debt is a triable issue and evidence has to be adduced to determine the meaning and effect of the alleged acknowledgment. The question of whether s 26 of the Limitation Act 1953 can come to the aid of the respondent is also a triable issue. In the final analysis, it is not a plain and obvious case which warrants a striking out. C D

[69] A point of law pertaining to the applicability of s 26 of the Limitation Act 1953 requires further serious argument and it is not appropriate to strike out the appellant's civil suit (*Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215) at this juncture. E

[70] The learned High Court judge also erred in law and in fact when Her Ladyship concluded that the appellant was seeking an order to set aside the sale. It must be recalled that the appellant sought to set aside the charge wherein declaratory reliefs are sought therein. F

[71] The charge, once registered, will be indefeasible subject to the exceptions contained in s 340 of the NLC. In the context of the present appeal, the appellant mounted the challenge under s 340(2)(b) of the NLC where registration was obtained by means of an insufficient or void instrument. And if the appellant succeeds, the transaction will be void and the charge is of no effect. That by itself calls for a full trial. G

[72] Under the NLC, the registered proprietor of any alienated land has the power to create a first legal and subsequent charges to secure repayment of any debt or a sum of money under s 241 of the NLC. Such powers of charging vested in the registered proprietor of any alienated land are always subject to any legal prohibition or restriction in interest imposed on the title to the alienated land as envisaged in s 241(3) of the NLC. It is germane at this juncture, to reproduce s 241(1) of the NLC: H I

> Powers of charging
>
> 241 (1) Subject to subsection (3) —
>
> (a) the whole, but not a part only, of any alienated land;

A (b) the whole, but not a part only, of any undivided share in alienated land; and

(c) any lease of alienated land,

(d)

B may be charged under this Act with —

(aa) the repayment of any debt, or the payment of any sum other than a debt; or

(bb) the payment of any annuity or other periodic sum.

C

[73] Now, once a charge is registered, the legal title or proprietorship of the charged land does not pass to or vest in the chargee. And the effect of charges is set out in s 243 of the NLC which reads as follows:

D Effect of charges

243 Every charge created under this Act shall take effect upon registration so as to render the land or lease in question liable as security in accordance with the provisions thereof, express or implied.

E

[74] So long as the borrower makes the repayment according to the schedule of repayment, the lender is quite happy. But where the chargor or, in the case of a third party charge, the borrower, is in default, the chargee will then seek his remedies under the NLC.

F

[75] It must be emphasised that under the NLC, the chargee is not the registered proprietor. As chargee, his interest is protected upon registration of the charge. When the chargor defaults in making repayment, two remedies are available to the chargee. Firstly, the land is to be sold by public auction under G Chapter 3 of Part 16. Secondly, by way of possession under Chapter 4 of Part 16.

[76] The above scenario is based on an ideal situation where everything goes on smoothly. But in a situation like the present appeal at hand, where the H appellant argued that the transfer of the charge is invalid and that the memorial is an insufficient or void instrument to register the transfer of the charge, then the case should proceed to trial. It should not be summarily struck out.

CONCLUSION

I

[77] No matter how weak the case is and that the appellant is not likely to succeed at the trial, it is not a good ground for the writ of summons and the statement of claim to be struck out. In the event, the appellant's civil suit is dismissed at the trial, the respondent will be compensated by costs.

[78] The issues raised in this judgment called for a full hearing and it should not have been summarily dismissed by the learned High Court judge.

[79] This is not a proper case for the High Court to invoke its summary process to strike out the appellant's in personam claim challenging the indefeasibility of the impugned charge. The issues raised require mature consideration and ought not to be disposed off summarily. Accordingly, we allowed the appellant's appeal with costs of RM10,000 here and below. We set aside the decision of the High Court. A full hearing should be accorded to the appellant. The appellant should have their day in court to prove its case. The deposit should be refunded to the appellant.

Appellant's appeal allowed with costs of RM10,000 here and below.

Reported by Kanesh Sundrum